

THE NEZ-PERCÉS INDIANS.

1876.

Graff

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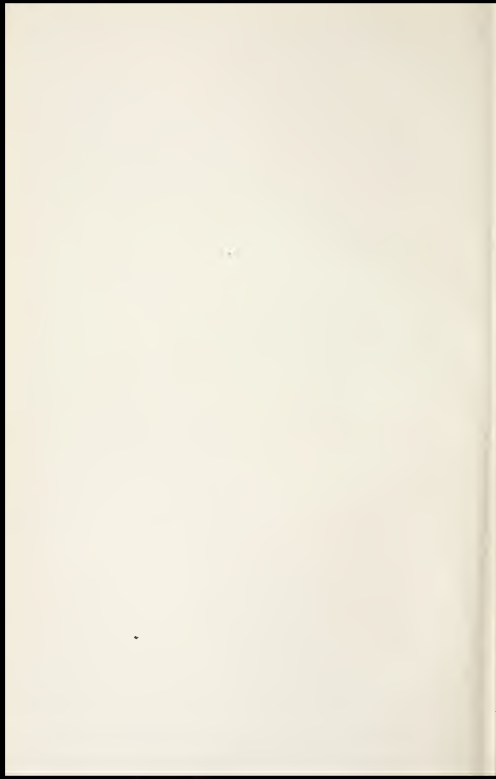
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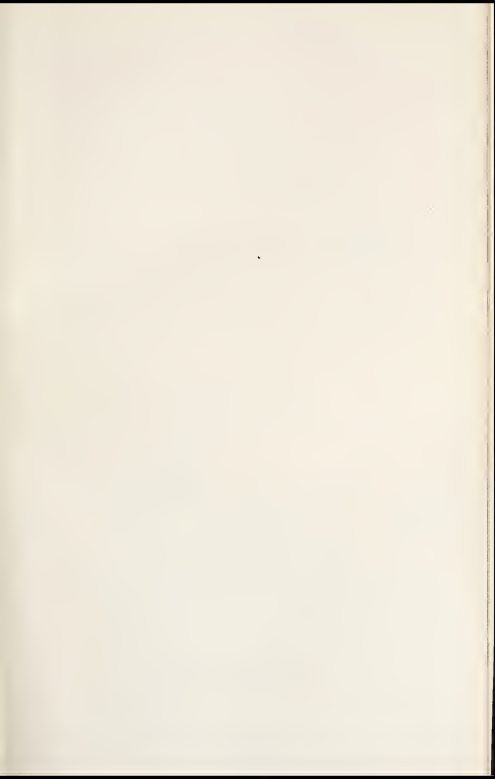
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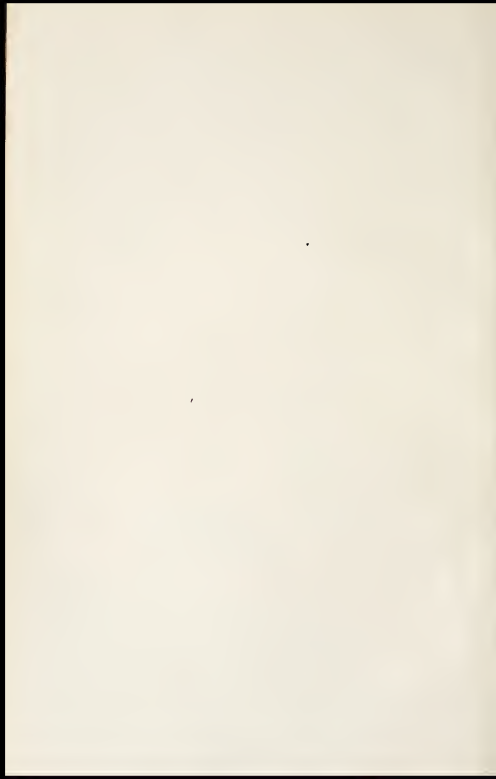
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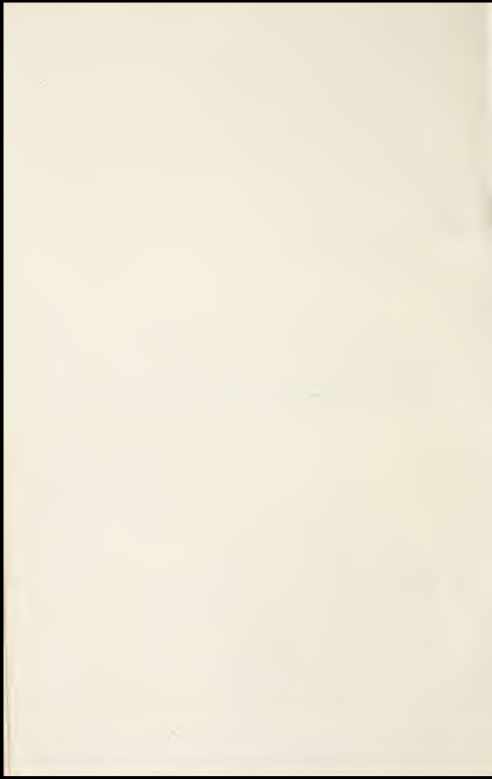
THE
STATUS OF
YOUNG JOSEPH
AND
HIS BAND OF NEZ-PERCE INDIANS
UNDER
THE TREATIES
BETWEEN
THE UNITED STATES
AND
THE NEZ-PERCE TRIBE OF INDIANS,
AND
THE INDIAN TITLE TO LAND.

PORTLAND, OREGON:
ASSISTANT ADJUTANT GENERAL'S OFFICE,
DEPARTMENT OF THE COLUMBIA.

1876.



ERRATUM:—Page 20. Mr. Nesmith is in error in his chronology. Lewis and Clark wintered at the mouth of the Columbia near Point Adams in 1805 and 1806, and returned to the Clearwater in the spring of 1806.



HEADQUARTERS DEPARTMENT OF THE COLUMBIA.

PORTLAND, OREGON, *January 8, 1876.*

Brigadier-General O. O. HOWARD,

Commanding.

SIR:—By your direction I have the honor to submit the following report of the *status* of Young Joseph and his band of Nez-Perce Indians in connection with his claim to Wallowa Valley in north-eastern Oregon. I am instructed to state facts and specially to avoid any expression of opinion as to the merits of his alleged claim:—

From the earliest settlement of this country, to March 3, 1871, when Congress prohibited future treaties with Indian tribes, it has been the uniform policy, “under the royal government, the colonies, the States, the confederacy, and this Union,” to make treaties with the different nations or tribes of native inhabitants of the Continent.

Under these numerous treaties, made by Indians with the United States, which recognized them “as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community,” the Indians have from time to time yielded their lands by successive treaties, each treaty containing “a solemn guarantee of the residue, until” many of the tribes “retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.”

A preliminary inquiry presents itself, prior to an examination of the several treaties with the Nez-Perce Indians, viz.:—

What recognized right or title have Indians to the lands they occupy?

I cite from the decisions of the Supreme Court of the United States:—

“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied;

or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors. *Worcester vs. State of Georgia*, 6 Peters, 515. (January Term, 1832.)

"But power, war, conquest, give rights which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions. *Ibid.*

"The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.' 8 Wheat. 573. *Ibid.*

"This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. *Ibid.*

"Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged. *Ibid.*

"The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other. *Ibid.*

"This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved 'that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies.' *Ibid.*

"From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, * * * manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. *Ibid.*

"The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. *Ibid.*

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the In-

dians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." *Ibid.*

"The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. *Cherokee Nation vs. State of Georgia*, 5 Peters, 1. (January Term, 1831.)

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. *Ibid.*

"They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered. *Ibid.* (Justice Johnson.)

"It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded. *Ibid.* (Justice Johnson.)

"In considering the bearing of the constitution on their rights,

it must be borne in mind that a majority of the States represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that congress asserted as to the ceded, and the States as to the unceded territory, their right to the soil absolutely, and the dominion in full sovereignty, within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on and appendant to the state governments. *Ibid.* (Justice Baldwin.)

"Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government. 8 Wheat. 592. *Ibid.* (Justice Baldwin.)

"And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves, the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs, and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent, or unless a just and necessary war should sanction their dispossession. *Ibid.* (Justice Thompson, dissenting.)

"In the case of *Johnson vs. McIntosh*, 8 Wheat. 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the States, the confederacy and this Union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction, and sovereignty was in the government, subject only to such rights." *Ibid.* (Justice Baldwin.)

I quote now from the leading case alluded to by Justice Baldwin in the preceding paragraph:—

"They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily dimin-

ished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. *Johnson & Graham's Lessee vs. McIntosh*, 8 Wheaton, 543. (February Term, 1823.)

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

"The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. *Ibid.*

"It has never been doubted that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it. *Ibid.*

"The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States. * * * The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted. *Ibid.*

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. *Ibid.*

"All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. *Ibid.*

"We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract

their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it. *Ibid.*

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice." *Ibid.*

It is evident from the foregoing citations, (introduced at some length,) that the title of Indians to the lands they occupy is a *title of occupancy only*; still, "this occupancy belongs to them as a matter of right, and not by mere indulgence;" this title of occupancy is "as sacred as the fee simple, absolute title of the whites." The sovereignty, the ultimate dominion is vested in the General Government, in which also rests the exclusive power to extinguish the Indian title.

In enacting laws establishing territorial governments, Congress has almost uniformly provided that the rights of Indians shall not be impaired. With one or at most very few exceptions, such has been the rule. The exception proves the rule. The organic acts of Wisconsin and Iowa, passed in 1836, contain this proviso. By the acts organizing territorial governments in

New Mexico and Utah, the Constitution, and laws of the United States not locally inapplicable, were extended over the new territories; and subsequently the Indian trade and intercourse laws, so far as applicable, were extended over the Indian tribes in said territories. The laws of the United States, so far as any provisions thereof might be applicable, were extended over Minnesota. Wyoming Territory was organized under a law, not only containing the proviso as to rights of Indians, but by its terms the Constitution, and all laws of the United States not locally inapplicable, were extended over it. The acts establishing the territories of Kansas, Nebraska, Nevada, Dakota, Colorado, Idaho, (12 stats., 808) and Montana, not only contain, each, the usual clause as to rights of Indians, but in addition expressly except, unless by consent of the tribes, all Indian lands from constituting a part of the said territories. The following is the text: "*Provided, further,* That nothing in this act contained shall be construed * * * to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of * * *, until said tribe shall signify their assent to the President of the United States to be included within said Territory."

The first section of the organic act of the Territory of Washington, approved March 2, 1853, (10 stats., 172) contains the proviso, "That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed."

The Territory of Oregon was established by the act of Congress, approved, August 14, 1848, and by the terms of the act embraced "all that part of the territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude." This extensive region included the present Territories of Washington and Idaho, and the State of Oregon. This act contains in the first section this proviso, "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation

respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed;" (9 stats., 323) an "express reservation to the United States of the continued exercise of the entire constitutional jurisdiction of the Federal Government regarding Indians, applied explicitly to the Territory of Oregon."

Moreover a clause of the fourteenth section of said act provides that "the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same, or any provision thereof, may be applicable." But in the statute under consideration—and this remark has application to each and all of the acts establishing new territories,—“the provision of the first section concerning Indians, like the provision of the fourteenth section concerning the force of acts of Congress generally, is but declaratory of what would have been the law without either,” for all general laws of the United States, so far as applicable “by their nature, subject-matter, or general tenor,” are *proprio vigore* in force throughout the limits of the Federal Domain.

I cite here two sections from the act approved June 20, 1874,—The Revised Statutes of the United States:—

“SEC. 1839. Nothing in this Title shall be construed to impair the rights of person or property pertaining to the Indians in any Territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any Territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any Territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular Territory.

“SEC. 1840. Nor shall anything in this Title be construed to affect the authority of the United States to make any regulations respecting the Indians of any Territory, their lands, property, or rights, by treaty, law, or otherwise, in the same manner as might be made if no temporary government existed, or is hereafter established, in any such Territory.”

This recital of the provisions of laws enacted since the opinion of the great Chief Justice was delivered confirms his proposition, that “the laws of the United States provide that all intercourse with Indians shall be carried on exclusively by the government of

the Union," and exhibits such a continued vigilance in the interests of its wards, that exclusive jurisdiction and intercourse may be regarded as the settled policy of the General Government.

The first treaty between the Government and the Nez-Perce Indians, of which I find any official record, was concluded at Camp Stevens, in the valley of the Walla Walla river, Territory of Washington, June 11, 1855. This treaty was ratified by the United States Senate March 8, 1859, and the Executive proclamation was issued April 29, 1859. (12 stats., 957)

The Commissioners on the part of the United States were Hon. Isaac I. Stevens, Governor and Superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, Esq., Superintendent of Indian affairs for the Territory of Oregon.

The Nez-Perces were represented by Aleiya (Lawyer) the Head-chief, Appushwa-lite (Looking-glass), Joseph, and chiefs, headmen and delegates, to the number of fifty-eight, "acting on behalf of and for said tribe, and being duly authorized thereto by them."

By this treaty "the said Nez-Perce tribe of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them," except, (article 2) "there is reserved from the lands above ceded for the use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians in Washington Territory, not to exceed the present numbers of the Spokane, Walla Walla, Cayuse, and Umatilla tribes and bands of Indians, the tract of land included within the following boundaries, to wit: commencing where the Moh-ha-na-she or southern tributary of the Palouse River flows from the spurs of the Bitter Root Mountains; thence down said tributary to the mouth of the Ti-nat-pau-up Creek, thence southerly to the crossing of the Snake River ten miles below the mouth of the Al-po-wa-wi River; thence to the source of the Al-po-wa-wi River in the Blue Mountains; thence along the crest of the Blue Mountains; thence to the crossing of the Grand Ronde River, midway between the Grand Ronde and the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder Rivers; thence to the crossing of the Snake River fifteen miles below the mouth of the Powder River; thence to the Salmon River above the crossing; thence by the spurs of the Bitter Root Mountains to the place of beginning. All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be

permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant, guarantying, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation, and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of equal value shall be furnished him as aforesaid.

"Article VI. The President may from time to time, at his discretion, cause the whole, or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said tribe as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas in the year 1854, so far as the same may be applicable.

"Article VIII. The aforesaid tribe acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory of Washington, the same rule shall prevail as that prescribed in this

article in cases of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

"Article XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States."

This general reservation included lands lying in part in the Territories of Washington and Idaho and partly in the State of Oregon, and embraced the Valley of the river (Woll-low-how) Wallowa.

The consideration, for the foregoing cession of territory to the United States, named in the treaty is two hundred (\$200,000) thousand dollars; to which add the sums annually appropriated by Congress, to date, to meet annuities and other stipulations of the treaty, two hundred and sixty-nine (\$269,050) thousand and fifty dollars; and an approximate sum of sixty-seven (\$67,200) thousand two hundred dollars to meet the future annuities and stipulated treaty payments, completing the specified twenty years,—and the actual consideration reaches the amount of five hundred and thirty-six (\$536,250) thousand two hundred and fifty dollars—"in addition to the goods and provisions distributed to them at the time of signing this treaty."

The second, and supplementary, treaty with the Nez-Perce Indians was concluded at the Council Ground in the valley of the Lapwai, Territory of Idaho, June 9, 1863, ratified by the Senate April 17, 1867, and proclaimed by the President of the United States April 20, 1867. (14 stats., 647)

The commissioners of the United States were Calvin H. Hale, Esq., Superintendent of Indian affairs for Washington Territory, and Mr. Charles Hutchins and Mr. S. D. Howe, United States Indian agents, respectively of the Flathead (Montana) and Tulalip (Puget Sound) agencies.

In behalf of the Indians, "and duly authorized thereto by them," appeared "Fa-Ind-7-1803 [1863?] Lawyer, Head Chief Nez-Perces Nation, Ute-sin-male-e-nun, Ha-harch-tuesta," and "other chiefs and headmen of the Nez-Perce tribe of Indians" to the number of forty-eight—in all fifty-one.

I cite the articles of the treaty pertinent to the question under consideration:—

"Article I. The said Nez-Perce tribe agree to relinquish, and do hereby relinquish, to the United States the lands heretofore reserved for the use and occupation of the said tribe, saving and excepting so much thereof as is described in article II. for a new reservation.

"Article II. The United States agree to reserve for a home, and for the sole use and occupation of said tribe, the tract of land included within the following boundaries, to wit: Commencing at the N.E. corner of Lake Wa-ha, and running thence, northerly, to a point on the north bank of the Clearwater river, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of the Hatwai creek; thence, due north, to a point seven miles distant; thence, eastwardly, to a point on the north fork of the Clearwater, seven miles distant from its mouth; thence to a point on Oro Fino Creek, five miles above its mouth; thence to a point on the north fork of the south fork of the Clearwater, five miles above its mouth; thence to a point on the south fork of the Clearwater, one mile above the bridge, on the road leading to Elk City, (so as to include all the Indian farms now within the forks;) thence in a straight line, westwardly, to the place of beginning.

"All of which tract shall be set apart, and the above-described boundaries shall be surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation, nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the country hereby relinquished, and remove to and settle upon the lands herein reserved for them, (except as may be hereinafter provided.) In the mean time it shall be lawful for them to reside upon any ground now occupied or under cultivation by said Indians at this time, and not included in the reservation above named. And it is provided, that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, or houses erected upon the lands hereby relinquished, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment therefor shall be made in stock or in improvements of an equal value for said Indian upon the lot which may be assigned to him within the bounds of the reservation, as he may choose, and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until said payment or improvement shall have been made. And it is further provided, that if any Indian living on any of the land hereby relinquished

should prefer to sell his improvements to any white man, being a loyal citizen of the United States, prior to the same being valued as aforesaid, he shall be allowed so to do, but the sale or transfer of said improvements shall be made in the presence of, and with the consent and approval of, the agent or superintendent, by whom a certificate of sale shall be issued to the party purchasing, which shall set forth the amount of the consideration in kind. Before the issue of said certificate, the agent or superintendent shall be satisfied that a valuable consideration is paid, and that the party purchasing is of undoubted loyalty to the United States government. No settlement or claim made upon the improved lands of any Indian will be permitted, except as herein provided, prior to the time specified for their removal. Any sale or transfer thus made shall be in the stead of payment for improvements from the United States.

"Article III. The President shall, immediately after the ratification of this treaty, cause the boundary lines to be surveyed, and properly marked and established; after which, so much of the lands hereby reserved as may be suitable for cultivation shall be surveyed into lots of twenty acres each, and every male person of the tribe who shall have attained the age of twenty-one years, or is the head of a family, shall have the privilege of locating upon one lot as a permanent home for such person, and the lands so surveyed shall be allotted under such rules and regulations as the President shall prescribe, having such reference to their settlement as may secure adjoining each other the location of the different families pertaining to each band, so far as the same may be practicable. Such rules and regulations shall be prescribed by the President, or under his direction, as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home, and the improvements thereon. When the assignments as above shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs, or under his direction, for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of, only to the United States, or to persons then being members of the Nez Perce tribe, and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior or the Commissioner of Indian Affairs

shall prescribe; and if any such person or family shall at any time neglect or refuse to occupy and till a portion of the land so assigned, and on which they have located, or shall rove from place to place, the President may cancel the assignment, and may also withhold from such person or family their proportion of the annuities or other payments due them until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe. The residue of the land hereby reserved shall be held in common for pasturage for the sole use and benefit of the Indians: *Provided, however,* That from time to time, as members of the tribe may come upon the reservation, or may become of proper age, after the expiration of the time of one year after the ratification of this treaty, as aforesaid, and claim the privileges granted under this article, lots may be assigned from the lands thus held in common, wherever the same may be suitable for cultivation. No state or territorial legislature shall remove the restriction herein provided for, without the consent of Congress, and no State or territorial law to that end shall be deemed valid until the same has been specially submitted to Congress for its approval.

"Article VIII. It is also understood that the aforesaid tribe do hereby renew their acknowledgments of dependence upon the government of the United States, their promises of friendship, and other pledges, as set forth in the eighth article of the treaty of June 11th, 1855; and further, that all the provisions of said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly,— the same obligations resting upon the United States, the same privileges continued to the Indians outside of the reservation, and the same rights secured to citizens of the U. S. as to right of way upon the streams and over the roads which may run through said reservation, as are therein set forth.

"Article X. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States."

The consideration, for this relinquishment of territory to the United States, named in the treaty is two hundred and sixty-two (262,500) thousand and five hundred dollars; to which add the sums annually appropriated by Congress, to date, to meet annuities and other stipulations of the treaty, one hundred and twenty-four (\$124,265) thousand two hundred and sixty-five dollars; and an estimated sum of eighty-two (\$82,000) thousand dollars to meet

and terminate the future annuities and payments stipulated in said treaty;—and the actual consideration reaches the sum of four hundred and sixty-eight (\$468,765) thousand seven hundred and sixty-five dollars—"in addition to the goods and provisions distributed to them at the time of signing this treaty."

A third treaty, amendatory to the treaty of June 9, 1863, was made at Washington City, District of Columbia, August 13, 1868; ratification advised February 16, 1869: proclaimed February 24, 1869.

The contracting parties were Hon. Nathaniel G. Taylor, Commissioner of Indian affairs, on the part of the United States, "thereunto duly authorized," and "Lawyer, head chief, and Timothy and Jason, chiefs, of the Nez-Perce tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them."

This is a treaty of concession. It reads, "Whereas certain amendments are desired by the Nez-Perce tribe of Indians to their treaty, concluded," June 9, 1863, &c. The following is the text of article 1: "That all lands embraced within the limits of the tract set apart for the exclusive use and benefit of said Indians by the 2d article of said treaty of June 9th, 1863, which are susceptible of cultivation and suitable for Indian farms, which are not now occupied by the United States for military purposes, or which are not required for agency or other buildings and purposes provided for by existing treaty stipulations, shall be surveyed as provided in the 3d article of said treaty of June 9th, 1863, and as soon as the allotments shall be plowed and fenced, and as soon as schools shall be established as provided by existing treaty stipulations, such Indians now residing outside the reservation as may be decided upon by the agent of the tribe and the Indians themselves, shall be removed to and located upon allotments within the reservation: Provided, however, That in case there should not be a sufficient quantity of suitable land within the boundaries of the reservation to provide allotments for those now there and those residing outside the boundaries of the same, then those residing outside, or as many thereof as allotments can not be provided for, may remain upon the lands now occupied and improved by them, provided, that the land so occupied does not exceed twenty acres for each and every male person who shall have attained the age of twenty-one years or is the head of a family, and the tenure of those remaining upon lands outside the reservation shall be the same as is provided in said 3d article of said treaty of June 9th, 1863, for those receiving allotments within the reservation; and

it is further agreed that those now residing outside of the boundaries of the reservation and who may continue to so reside shall be protected by the military authorities in their rights upon the allotments occupied by them, and also in the privilege of grazing their animals upon surrounding unoccupied lands."

The foregoing treaties, concluded by commissioners "duly authorized" by the respective contracting parties, are *prima facie* conformable to law; have been accepted, ratified, confirmed, and proclaimed by the Senate and President of the United States; and, by paragraph two, article six, of the CONSTITUTION, " * * * all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *"

These treaties contemplate a removal to and residence by the Indians upon these reservations within one year after their respective ratifications, except as indicated in the provisos of the second articles (*supra*) of the treaties of 1855 and 1863. Whether the President of the United States has hitherto caused to be valued—and payment to be made therefor—the substantial improvement of any Indian (as therein provided), or whether any Indian had then any substantial improvement to be valued and paid for, or otherwise, no Nez-Perce Indian or band of Indians, so far as is known, has ever, or does now, set up any claim to a residence off the established reservation by virtue of these provisions appearing in the treaties. There is one exception to the absolute truth of this statement, if I am correctly informed; viz.: Timothy,—mentioned so favorably in the report by Brevet Lieutenant-Colonel Steptoe of the battle at Te-hoto-nim-me, May 17, 1858. The command, four companies, he writes, "was ferried across Snake river by Timothy, a Nez-Perce chief." "I had vast difficulty in getting the Dragoon horses over Snake river, which is everywhere wide, deep, and strong, and without the assistance of Timothy's Nez-Perces it would have been utterly impossible for us to cross, either going or returning;" (and this to a command *returning*, in fact retreating, defeated by hostile Indians and without any means of crossing the Snake. "The command would have been entirely cut off had it not been for the assistance rendered by the Nez Perces. They came forward of their own accord, and saved the remnant of that command, although the hostile tribes were using every influence to induce the Nez Perces to engage in hostilities against us.")—Timothy, the chief who made the journey to Washington City and there signed the treaty of concession of June 9, 1863, of whom agent Montieth writes: He lives at this date outside the established reservation on Al-po-wa-wi

creek, in Washington Territory, and "sets up such a claim: He claims for himself and his followers, * * * I understand that he has homesteaded 160 acres of land in accordance with the provisions of a law, approved March 3, 1875." His example and influence have their effect upon other members of the tribe. It was understood by the commissioners to the treaty of '55, that "there were permanent improvements held by different members of the tribe," and the chief commissioner to the treaty of '63, informs me "Joseph had made considerable improvements in Wallowa Valley" and "claimed that he should be paid for his improvements," and, I am convinced, that at the dates of ratification—March 8, 1859, and April 17, 1867,—of the treaties of '55 and '63, individual Indians *had*, "fields enclosed and cultivated," specified in the text of the treaties as "*substantial* improvement;" nevertheless, based upon my knowledge of Indian character gained through a residence upon reservations, I have reached this conclusion with grave doubts. In any event, I can find no evidence that the United States has ever, even attempted, to comply, on its part, with the treaty stipulations to value and make payment therefor.

It should, however, be remarked that provision is also made in the third article of the second treaty, and the first article of the third treaty, for members of the tribe residing *outside* the reservation, from time to time, subsequent to the expiration of the one year after the ratification of the second treaty, to come upon the present reservation and locate on a residue of the land reserved and held in common for pasturage, and to whom "lots may be assigned from the lands thus held in common, wherever the same may be suitable for cultivation;" and there is this further concomitant and important proviso, "That in case there should not be a sufficient quantity of suitable land within the boundaries of the reservation to provide allotments for those now there and those residing outside the boundaries of the same, then those residing outside, or as many thereof as allotments can not be provided for, may remain upon the lands now occupied and improved by them, provided, that the land so occupied does not exceed twenty acres for each and every male person who shall have attained the age of twenty-one years or is the head of a family, and the tenure of those remaining upon lands outside the reservation shall be the same as is provided in said 3d article of said treaty of June 9th, 1863, for those receiving allotments within the reservation; and it is further agreed that those now residing outside of the boundaries of the reservation and who may continue to so reside shall be protected by the military authorities in their

rights upon the allotments occupied by them, and also in the privilege of grazing their animals upon surrounding unoccupied lands."

The phrase "Indians [members of the tribe] now residing outside the reservation" is certainly broad enough to include Young Joseph and his band; but I am impressed, construing the expression with the context, that it was not intended, by the commissioners upon the part of the Nez-Perces or the Government, that the language of the first article of the third treaty should apply specially to the recognized non-treaty Indians; that it had reference rather to other Indians. I am not to be understood as affirming that the Nez-Perces would not willingly see Young Joseph's band, or other so-called non-treaty Indians of the tribe, remove to and locate upon the established reservation; nor that the United States would in the least object to their removal; on the contrary the Government desires Joseph to remove there and take up his permanent home; but simply that the provisions, applicable, of the treaties, especially those of the third treaty, were not inserted therein in the interest of Joseph and the non-treaty Indians, but in the interest of another class.

In any event, it may be safely asserted, having reference solely to the second and third treaties, that, so far as Young Joseph (and his band) in connection with his claim to Wallowa Valley is concerned, he has not claimed—even if he be entitled to them or any of them—the privileges and benefits of their several provisos. On the contrary he haughtily disavows these treaties.

The proviso in the third treaty, "That in case there should not be a sufficient quantity of suitable land within the boundaries of the reservation to provide allotments for those now there and those residing *outside* the boundaries of the same, &c." must be briefly noticed. The census of the tribe in '51 is officially reported as 1,880. In November '75 the population is stated in the annual report of the Commissioner of Indian affairs at 2,800, of whom 1,320 are males, showing, contrary to the generally received notion of Indian decay, in this tribe an increase in population. The established reservation has an area of 746,651 acres. Rejecting ninety-six per centum of the area as not suitable for cultivation, and we have about thirty thousand (29,866) acres tillable. Counting the males at 1,500 and each one as upwards of twenty-one years of age, or the head of a family, and there is still "a sufficient quantity of suitable land within the boundaries of the reservation" to provide allotments of twenty acres each, in accordance with treaty stipulations. I also have information from the Lapwai agency, "that there is plenty of land, suitable for agricultural purposes, to give

each head of a family of the Nez-Perce tribe of Indians twenty (20) acres, provided that the land now occupied by white settlers—now living on this reserve—is turned over to the Indians, as was intended by the agreement made in 1868.”

One additional and incidental remark, and I leave this portion of the subject. In the following sentence from a letter, dated July 21, 1873, of Governor Grover, to the Secretary of the Interior, viz.: “By the latter treaty the Nez-Perce tribe agreed to relinquish, and did relinquish to the United States all the lands reserved by the treaty of 1855, excepting a certain specified tract *designated* as ‘a home, and for the sole use and occupancy of said tribe,’” the quotation which he makes from the treaty loses entirely its force when compared with the text of the treaty of 1855, in which occur the expressions, “for the use and occupation of the said tribe;” “for the exclusive use and benefit of said tribe;” “as a *permanent* home;” and the inference, which he apparently desires to be drawn from the use of the words “a home” in the latter treaty, becomes a still stronger inference when we consider the language of the former treaty, “a *permanent* home.”

* The Nez-Perces are distinguished for traits, rare in the Indian. Noted for their superior intelligence, their power, and wealth of cattle and horses, their fine physical development, freedom from disease, and comparative virtue, they have been conspicuous in years past for their warm friendship for and unshaken fidelity to the pale-faces, and for their strong attachment and unwavering loyalty during the late civil war to the Flag of the Union. Seventy years ago, when those early pioneers crossed the Rocky Mountains and descended the valley of the Clearwater, the Nez-Perces received Lewis and Clark with kindness. This party was, Senator Nesmith states, “perfectly in the power of and at the mercy of the Nez-Perces. The arms, horses, and the few articles of goods in the hands of the explorers, would have been a prize sufficient to tempt the cupidity of any tribe of savages less honest than the Nez-Perces. So far from despoiling the party, they rendered them every assistance in their power, and kept their horses for them during the winter of 1806 and 1807 while the party visited and wintered at the mouth of the Columbia. On their return to the Kooskooska in the spring of 1807, the natives delivered to them their horses and other property, with a fidelity that would have reflected credit upon a civilized people.” They were equally kind to the adventurous Bonneville in '32, and to the per-

* AUTHORITIES: Department Records, Public Documents, Gray, Hale, Lindsay, Montith, Nesmith, Odeneal, Palmer and Thompson.

severing Pathfinder, Fremont in '43. In 1846, after the murder of Dr. Marcus Whitman, missionary and Christian teacher, they assured the people at the Lapwai Mission they would protect them in their persons and property if they would remain, and they indignantly rejected the proposal of the Cayuses to join in war. In the spring of 1853, they again scornfully rejected a Cayuse message requesting the tribe to unite in a grand war combination against the pale-faces, and two years later, when the threatened Indian hostilities culminated in actual war, they not only refused to join therein, but even protected Governor Stevens *en route* from the Blackfoot country and assisted him to reach Walla Walla in safety. In the campaign of 1858, under General Wright, in the Palouse and Coeur d'Alene country, they raised and joined him with a mounted company, and rendered most important service. When rebel emissaries—and in this respect, and with like result too, the Seceding States imitated the Mormon tactics of '57-58, who disseminated their baneful influence, through the Snakes to whom they supplied ammunition and arms in abundance, even to the Nez-Perces. The Mormons went so far as to establish a settlement on the head-waters of the Salmon river with the sole intent to further their foul purpose.—I repeat, when rebel emissaries and sympathizers, representing the power of the Government as overthrown; that the annuities would not be paid; that the United States were unable to resist them; and by means of other like seditious language, and treasonable practices, endeavored to seduce the Nez-Perces from their allegiance to the Republic and hatch revolt, they happily withstood all the alluring arguments of treachery and deceit, and remained the most patient and faithful of our Indian allies. If one probable * case of murder in '62 be rejected, it is a fact, without precedent in American Indian history, that no Nez-Perce of the full-blood ever killed a white man.

The Nez-Perces originally inhabited a region of country west of the Bitter Root Mountains, along the Snake, Clearwater and Salmon rivers and their tributaries; each of the several bands occupying a certain locality recognized as its peculiar home. Indeed, the locality conferred a name upon the band. Joseph's, for example, in early times was known as the Salmon river band. The confederated bands never recognized any succession of chiefs as a dynasty to which a tribal allegiance was due, nor, prior to the year 1854,—with one exception—, any chief as the head of the

* Sa-poon-mas, of Big Thunder's band; arrested April 2, '63, for killing a white man, VARDLE. The Indian subsequently made confession. It was a case of manslaughter.

Tribe; and from the elevation of Lawyer the headchief has been elective. Their form of government was a confederacy, composed of numerous bands, each having a chief and three secondary rulers who annually assembled in council to discuss, agree upon and promulgate edicts or laws for their mutual government.

In 1842, Dr. Elijah White, commissioned as sub-Indian-agent west of the Rocky Mountains, visited this tribe. He found it without a recognized chief, and virtually appointed to that position an Indian named Ellis. He assembled the tribe in council, and gave a code of laws for its government. Ellis had been placed in school at the Selkirk settlement, about five years, and could read and write the English language, and for this reason he was selected by Dr. White. The tribe was not pleased with this innovation; still, as late as the Spring of 1846, Ellis was regarded as Chief of the Nation, but passed much of his time beyond the Rocky Mountains in the buffalo country, and died there in 1847.

From the death of Ellis to the elevation of Lawyer there was an interregnum, or rather the customary and original form of government was probably restored. Hitherto, then, if the imposed and unsatisfactory leadership of Ellis be excepted, the Nez-Perces were without a headchief. It was their custom to make excursions from time to time to the buffalo country; then parties would come together from the different bands and select a leader, who generally retained the position until the return of the foray. Lawyer was chief of a band, and whenever he was to be of the party, either for hunting or war, usually was the chosen leader. He was the son of an Indian of prominence, undoubtedly a Brave, and, having attended the school established by the missionary Reverend H. H. Spalding, not only could read and write in the Nez-Perce tongue—in fact, the only member of the tribe who could do so with any degree of correctness—but could also to a limited extent speak the English language. For these reasons and remembering the precedent, in Ellis, he had already aspired to the Chieftainship of his Nation. The Elder Joseph—among others—was a formidable rival, claiming as the descendent of a line of chiefs from time immemorial by a sort of Indian Divine right, and regarding Lawyer as a pretender and usurper. But, meantime, several bands had yielded a semi-assent to the pretensions, influence and power, of Lawyer.

It is easy to understand that the Commissioners of the Government, at the Council at Camp Stevens, in May, 1855,—finding also the Indians themselves, when interrogated as to who was their principal chief, pointing to Lawyer, and *all* the chiefs, headmen

and delegates, from each and every band, seemingly recognizing him as such—would naturally treat with the tribe through the agency of Lawyer, not only as a Chief, but as an English-speaking Indian. Such indeed, is the fact; and, if not already firmly seated upon his Indian throne, the officials then and there gave him a commission, and recognized, and treated with, him as Chief of the Nez-Perce Nation. Lawyer and Ellis, undoubtedly, owe their selection and appointment as headchiefs, to the fact of their partial familiarity with the English language, and their better knowledge of their own tongue.

Joseph, ambitious to become the acknowledged leader and renowned brave of his tribe, seeing his claims unnoticed and his rival recognized,—and for other reasons—, was dissatisfied and, with other chiefs, objected to the treaty. Subsequently, however, Joseph yielded, and gave a reluctant assent and his signature to the treaty of June 11, 1855. *Apparently*, he signed it in good faith; and ever after, at least there is no allegation to the contrary, faithfully adhered to its obligations.

The treaty of '55 was not ratified and confirmed until March-April, 1859, and, meantime, the Indian mind became unsettled by and restless at this delay of the Government and the gradual encroachment of the whites upon their lands, and fears of hostilities by even this tribe were entertained. Accordingly, under instructions from Headquarters, Department of the Pacific, dated July 4, 1858, the subjoined "Treaty of peace and friendship between the United States and the Nez-Perces Tribe" was concluded, August 6, 1858, by Colonel George Wright, 9th Infantry, at Camp in the Walla Walla Valley. This agreement is signed by Alayana—which I presume to be a different orthography of Lawyer's Indian name—and thirty-seven other Indians, among whose names I find those of Timothy, Three Feathers, Speaking Eagle, Captain John, Jessie and Richard.

"Article 1. It is agreed that there shall be perpetual peace between the United States and the Nez-Perces tribe.

"Article 2. In the event of war between the United States and any other people whatever, the Nez-Perces agree to aid the United States with men to the extent of their ability.

"Article 3. In the event of war between the Nez-Perces and any other tribe the United States agree to aid the Nez-Perces with troops.

"Article 4. When the Nez-Perces take part with the United States in war they shall be furnished with such arms, ammunition, provisions, &c., as may be necessary.

"Article 5. When the United States take part with the Nez-Perces in war, they (the United States) will not require the Nez-Perces to furnish anything to the troops unless paid for at a fair price.

"Article 6. Should any misunderstanding arise hereafter between the troops and the Nez-Perces, it shall be settled by their respective chiefs in friendly council."

Similar treaties of peace and friendship were concluded by General Wright during the campaign of '58 with other tribes, in each of which it is agreed by the parties thereto that "this treaty shall also extend to and include the Nez-Perces nation of Indians."

The discovery of gold, in the autumn of 1860, in the western spurs of the Bitter Root Mountains, was the signal for a rush of miners to the sources of the Clearwater and Salmon rivers. The gold fields extended, on the eastern boundary of the reservation, from Salmon river on the south to the north fork of the Clearwater, and proved very rich; the amount of gold dust taken out in the season of '62, was estimated at from seven to ten million dollars. The power of gold, even when hidden in the earth, over man, is attractive; its discovery is irresistible. At once a mass of the very worst whites was brought in contact with the Nez-Perce Indians; treaty obligations were not thought of by our citizens, or if thought of were disregarded; the military authorities were not called upon to enforce these obligations, and had they been, the Army could not have done it. The attempt to restrain miners would be like an effort to stay a whirlwind. In June '62, in contempt of the treaty, and of their sacred rights most solemnly guaranteed to the Indians, fifteen thousand whites were dispersed through the several mining camps, and the stream of new arrivals was unchecked. The then Nez-Perce agent writes: "the travelled roads through the reservation to all of the mining localities pass by some one or more of the Indian villages, which brings the Indians in hourly contact with the whites. Such unrestrained intercourse is, of course, constantly abused by unprincipled white men, and drunkenness and licentiousness are alarmingly on the increase. There is no local force here of any avail to compel even the semblance of observance of the humane laws for the preservation and security of the Indian." The chiefs, to their credit be it written, persistently insisted on the removal of whiskey sellers from points outside the mining towns and the routes of travel. I could fill page after page in portraying the number and nature of the outrages the Indians and their families were subjected to. In the autumn of '61, the chiefs complained

to the superintendent of Indian affairs that even the employees, in accordance with treaty stipulations, sent to instruct them, had taken squaws as mistresses, and indeed, had done little else; and "they seemed desirous to know if that was the method proposed by the government to carry out the stipulations of the treaty."

The violence and aggravated outrages of the unprincipled and vicious whites to and upon the Indians, without regard to sex, and the unrestricted sale of liquor to them, was a subject of the most serious concern, and chiefly the cause of apprehended difficulties. To rid themselves even partially of these grievous troubles and of constant annoyances occasioned by this invasion of their lands, the Nez-Perces agreed in the spring of '61, that the miners should be allowed in the country north of the Clearwater. The following is the text of the agreement:—

"Articles of agreement made this 10th day of April, 1861, between Edward R. Geary, superintendent of Indian affairs for Oregon and Washington, and A. J. Cain, agent for the Nez-Perces in behalf of the United States, and the chiefs and head men of the Nez-Perces in behalf of the said nation, said parties acting in accordance with authority vested in them by the 2d article of the treaty between the United States and the Nez-Perces of the 11th of June, 1855.

"1. That portion of the Nez-Perce reservation lying north of the Snake and Clearwater rivers, the south fork of Clearwater and the trail from said south fork by the 'Weipo' root-ground, across the Bitter Root mountains, is hereby opened to the whites in common with the Indians for mining purposes, provided, however, that the root-grounds and agricultural tracts in said district shall, in no case, be taken or occupied by the whites, but shall remain for the exclusive use and benefit of the Indians.

"2. No white person, other than those in the service of the United States, shall be permitted to reside upon or occupy any portion of the Nez-Perces reservation south of the line above described, without the consent of the superintendent, agent, and tribe, except that the right of way to the mining district north of said described line may cross Snake river at any eligible point below the mouth of Clearwater.

"3. The entire portion of the Nez-Perces reservation hereby opened to the whites for mining purposes, shall in all respects be subject to the laws of the United States regulating trade and intercourse in the Indian country; and no person shall be permitted to trade therein without obtaining license and giving bonds as provided by law.

"4. It is further agreed on the part of the United States that a

sufficient military force shall be placed on the reservation to preserve the quiet of the country and protect the Indians in the rights secured to them by treaty and these articles of agreement.

"In testimony whereof, we have hereunto set our hands this day and year aforesaid.

EDWARD R. GEARY,

Superintendent of Indian affairs, Oregon and Washington.

A. J. CAIN,

United States Indian Agent, Washington Territory.

LAWYER,

Head chief Nez Percés Nation, and forty-seven others."

Before this "agreement could go practically into effect, richer gold fields were found to the south of that limit, and headlong thitherward rushed the miners and soon discovered the chief 'El Dorado,' the Salmon river mines. These united discoveries establishing the mines to course on the whole western foot-hills of the Bitter Root mountains, no regard was paid to the restriction against travelling on the south side of the Clearwater river; so the whole reservation was overrun in every possible direction to all the mines." Superintendent Hale, writes: "In their simplicity, and with full faith in the justice of the government, their consent is obtained to make a steamboat landing and erect a warehouse at the mouth of the Clearwater; to a right of way across the reserve to the gold fields, and to the privilege of working the mines. This was done without any remuneration being asked on their part for the concessions thus made. It was, however, expressly provided that no settlements should be made by the whites, and that their root grounds and agricultural tracts should be preserved for the exclusive use and benefit of the Indians. To preserve the quiet of the country, and to protect their lands from trespass, it was furthermore agreed, on the part of the United States, that a sufficient military force should be placed on the reservation. No sooner were these privileges granted than the landing and warehouse became a town, now known as Lewiston; their reservation was overrun; their enclosed lands taken from them; stock turned into their grain fields and gardens; their fences taken and used by persons to enclose the lands to which they laid claim, or torn down, burned, or otherwise destroyed. The accompanying report of Agent Hutchins gives much information on many of these points up to the date at which it was written, and the tribute of praise rendered by him to Lawyer, the head chief, is as deserved as it is true. The greater part of his time he is engaged in visiting his people, and using all his influence to keep them peaceable and preserve their faith with the government, and was so employed at the time of my recent visit. I have thus given a plain statement of

the facts. Would they were otherwise, as they are only calculated to make us blush with shame. I should, however, be recreant to my trust if I attempted to conceal them. My object in making them known is to lead to the providing of a remedy while yet there may be time, and avert the retribution that the continuation of such wrong must sooner or later produce."

Lewiston became an absolute necessity as a depot of supply to the large mining population. Accordingly in October '61 a town site was laid off on the reservation on the Snake at the confluence of the Clearwater, and despite the agent calling attention to the laws forbidding it, an active little village sprung up, with a population approximating twelve hundred whites; "along all the roads on the reservation to all the mines, at the crossing of every stream or fresh-water spring, and near the principal Indian villages, an inn or 'shebang' is established, ostensibly for the entertainment of travellers, but almost universally used as a den for supplying liquor to Indians. The class of men that pursue this infamous traffic are, as might be expected, the most abandoned wretches of society, * * It is but justice to state that the rigid enforcement of law against the scoundrels who sell whiskey to the Indians would meet the approbation, encouragement, and aid of the great majority of citizens now here prosecuting useful and honorable avocations." In the autumn of '62 the Nez-Perces gave their consent to the occupation of Lewiston and the other mining towns by the whites, these places having been excepted from the strict provisions of the treaty by the Indians themselves. This fact, that a half-million of dollars was paid for freight at Lewiston during the year 1862, conveys an idea of the interests centering at that point. Lewiston was also selected as the Capital of the new Territory of Idaho.

Our people had come to consider the reservation as rich in minerals and replete with fine agricultural and grazing lands, and consequently too extensive and valuable for a tribe of "savages." The pale-face coveted the possessions of the red-man. The Nez-Perces learned that the whites were clamorous to gain possession as well of their farming and grazing land as of the gold mining districts. A journal, *The Golden Age*, published in that vicinity, in the most incendiary manner, called upon the whites to settle, occupy, plough up and cultivate the land upon the reservation without regard to the Indian title and in contempt of any treaty which might be made with them. The Government, meantime, having ratified the treaty in 1859, after an inexcusable delay of four years, had with criminal neglect disregarded its obligations. In October '62 General Alvord writes: "even now at the end of

seven years I can find but few evidences of a fulfillment of the treaty. Lawyer has never received but six months of his salary as headchief; and the house with which he was to be provided has but just been commenced; few of their annuities have ever reached them." Superintendent Hale, in the same month, writes: "the appropriation made to provide for *removal*, breaking up, fencing farms, building houses, supplying them with provisions and a suitable outfit, has, in good part, either been squandered or withheld. Their annuities have not been paid fully and promptly, and much of that which has been received in the way of clothing, &c., not adapted to their wants; some of it worthless trash, bought at exorbitant prices. The shops and agency buildings are but partially completed; the mills are unfinished; no house has been erected for the headchief; no land ploughed or fenced for him; neither has his salary been paid according to agreement." During fifteen months, prior to June '62, not a dollar was received applicable for that period. Yet I would not arraign the Government without reason! The treaty of '55 was ratified and that of '63 concluded at an unfortunate—for the Indian generally—epoch in the history of the American Republic. The latent seeds of secession and treason were already germinating in '59, to spring forth into visible life and active rebellion in '61, and successful revolution and rigorous civil war in '63. In the momentous conflict then raging, the stupendous struggle of a nation for existence, its wards,—the Indian,—were almost forgotten, and its obligations to them solemnized by formal treaty but partially fulfilled, amid the roar of battles "heard round the world."

From all these causes, there was much dissatisfaction, restlessness and threatened hostilities on the part of the Indians; the natural results of violated treaties. Senator Nesmith said: "a combination of circumstances exists there such as never existed anywhere else without bringing on war."

In this unfortunate and unexpected state of affairs, the best the Government could do for the Nez-Perces, and the only honorable course, was to provide for negotiating a new treaty, so as to compensate, as far as possible, by purchase, the Indians for the unauthorized and illegal occupation, by the whites, of their lands; and in this spirit Congress passed the following enactment:—"Sec. 3. *And be it further enacted*, That the sum of forty-thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated to enable the President to negotiate a treaty with the Nez-Perce Indians of Oregon and Washington Territory, for the relinquishment of a portion or all of their

present reservation, or its exchange for other lands." Act of Congress, approved July 5, 1862. (12 stats., 529)—and subsequently, under this legislation, was concluded the treaty of June 9, 1863.

While the question of the adoption of the foregoing section, (3.) was under consideration in the United States Senate, May 13, 1862, Mr. Nesmith remarked: "In the annual report of the Commissioner of Indian affairs, he states * * * that it is necessary to negotiate treaties in order to adapt the location of the reservation of the tribe to the circumstances now surrounding them, so widely different from those in existence at the time their present treaty was negotiated. * * * The Indians are anxious to dispose of the reservation and remove to some point where they will not be intruded upon. They allege, and I believe that it is not disputed, that they have faithfully observed the obligations of the treaty, but that its provisions have been violated by the Government in permitting our citizens to invade their reservation in search of gold."

Nevertheless, the treaty of 1863, or rather the discovery of gold on their reservation and the consequent events of the years immediately preceding its consummation, proved a sort of Pandora's box to the Nez-Perce Nation, for from its date there has been a radical separation of the tribe into recognized treaty and non-treaty Indians.

Neither of the treaties was concluded without strong opposition. While Superintendent Palmer writes, "that it was understood that each and every branch or band of the Nez-Perce nation was represented in that council"—May, June '55, "and mostly by the chiefs or headmen of the band;" and believes a majority of the tribe was present at the council; and Superintendent Hale states, that "the whole Nez-Perce nation was represented in the council"—May, June '63—; "that at least three-fourths of the nation were favorable to this treaty; that several under-chiefs did not sign the treaty, but were present, and consented to have Lawyer and others, as representatives of the nation, sign for them;" yet it is an undisputed fact, that Old Joseph, at the council in '55, was at first strongly opposed to a treaty. Looking-glass, at the opening of the council, was not present; but one day, returning with his warriors from a hostile foray, like a storm he charged into the council, and the following day harangued the assembly and denounced in unmeasured terms those counseling submission to the proposition of the Government; and yet, he subsequently signed the treaty. Big Thunder and Eagle-from-the-Light would not assent to, but protested against, the negotiations for the extin-

guishment of the Indian title. The acquiescence of Joseph and Looking-glass in the treaty of '55, was, in my opinion, forced; they at least, if not others, signed the treaty under pressure, and against their own will; their hands of course partook of their sentiments; they were but the indices of the *true inwardness* of the bands. In very truth, so far as many of the Indians were concerned, the consummation of the treaty was simply the result of superior intelligence and power in the guardian over the ward, and practically it was amicable coercion. Joseph, (Looking-glass, Mr. Hale informs me, died a few months before the council of '63), Eagle-from-the-Light, Big Thunder, and several less prominent chiefs, and headmen,—with their followers—, were not parties to the treaty of '63; have never acknowledged its binding force, or accepted any of its privileges or benefits. To the treaty they have objected the want of authority in the Indians who spoke for the tribe. They have uniformly haughtily and utterly repudiated it.

Joseph, Looking-glass, Big Thunder, and Eagle-from-the-Light, and perhaps others, appear to have been rather the war-chiefs of the tribe, while Lawyer and his partisans were the party of peace. There is official information in the Department records, that the non-treaty Nez-Perces are well armed with breech-loading rifles, and can bring into the field at least six hundred warriors.

Under the following instructions dated, Department of the Interior, &c., &c., February 7th, 1873, from the Commissioner of Indian affairs, viz:—"Sir: This office is advised that there are a number of Nez-Perce Indians in Wallowa Valley, in Oregon, with whom it is apprehended trouble may ensue, by reason of white settlers locating upon lands claimed to be owned by the Indians. It is therefore desirable that an effort be made, without delay, to make some arrangement to avoid such a contingency.

"It is also desirable that they be induced to locate upon the reservation belonging to the tribe in Idaho, if possible. You are therefore directed to visit them without unnecessary delay, and arrange, if possible, for their early removal to the established reservation.

"In case, however, of their refusal to remove to said reservation, you will ascertain fully their views and wishes in regard to their locating on some other reservation. Should they refuse to go upon any reservation, outside the limits of said valley, you will ascertain whether they require all of the valley in which they are now living, or whether they will be content with a part of it; and in case a reservation should, in your opinion, be provided for them where they are, you will report the boundaries of the same to this

office, in order if deemed advisable that it may be set apart by executive order.

"You will keep this office fully advised of your action under these instructions. You will not, however, remove the Indians from their present location by force or otherwise, until further instructed;"—a Commission, consisting of T. B. Odeneal, Esq., Superintendent of Indian affairs in Oregon, and Mr. J. B. Montith, agent of the Nez-Perces, held a council at the Lapwai Agency on the twenty-seventh of March '73 with Young Joseph and his band, and subsequently submitted to the Department the subjoined report embracing the conclusions of fact at which it arrived, viz.:—

"*First*—That prior to the treaty of 1855, the Nez-Perces had no head-chief of the Nation, but were divided up into bands; that each band had a chief or head-man, and each claimed, occupied and held the lands within certain natural boundaries.

"*Second*—That the old chief Joseph was at the head of the band which is the subject of this report, and in accordance with the custom aforesaid owned the Wallowa Valley.

"*Third*—That old Joseph assented to and signed the treaty of 1855, upon the condition that his country, the Wallowa Valley, should be included within the boundaries of the Nez-Perce reservation, and it was accordingly so included.

"*Fourth*—That at the making of the treaty of 1855, L. I. Stevens, then Governor, and *ex officio* Superintendent of Indian affairs, of Washington Territory, appointed an Indian named 'Lawyer' head-chief of all the Nez-Perces, which produced much dissatisfaction, and not one-half of the tribe ever recognized him as their chief.

"*Fifth*—That in 1863, the Superintendent of Indian affairs for Washington Territory made a supplemental treaty with the so called head-chief 'Lawyer' and the headmen of some of the bands, by the terms of which a large scope of country, including the Wallowa Valley, was ceded to the United States. Joseph not only refused to sign or have anything to do with this treaty, but protested against the sale of his lands without his consent,—insisting that no one but himself had any right or authority to dispose of the Wallowa Valley. Since the treaty of 1863 this band has refused to accept any annuities from the Government. Old Joseph claimed that this valley was his by right of occupation for a lifetime, and on his death-bed he bequeathed it to his people, with his son, Young Joseph, to succeed him in the chieftainship.

"This band declines to come and reside permanently upon what is now called the 'established reservation' of the tribe in Idaho. They do not wish to locate upon any other established reservation.

They do not desire a separate reservation made of Wallowa Valley. They claim that the whole of the valley belongs to them, and are opposed to whites settling there.

"Owing to the coldness of the climate, the Wallowa Valley is not a suitable place for a separate reservation upon which to locate and keep Indians.

"The question for the Government to determine is as to whether the title of these Indians was extinguished by the so-called supplemental treaty of 1863, in which they took no part. If so extinguished, then this band should be removed to and kept upon the reservation of the tribe in Idaho; if not, then the valley they claim is still a part of said reservation, and they should be permitted to occupy it whenever it suits their pleasure to do so.

"If any respect is to be paid to the laws and customs of the Indians, then the treaty of 1863 is not binding upon Joseph and his band. If so, then Wallowa Valley is still a part of the Nez-Perce reservation; this being the case, then the Government is equitably bound to pay the white settlers for their improvements, and for the trouble, inconvenience and expense of removing from there.

"The matter should be determined without delay. The whites must be induced to leave or the Indians must be removed. Each considers the other a trespasser, and the rash act of some imprudent white man or reckless Indian is liable to produce serious trouble at any time."

Based on this report, the Secretary of the Interior gave directions "That the band of Indians referred to be permitted to remain in said valley and occupy it during the summer and autumn, or for such time as the weather is suitable, according to their previous custom, and that assurances be given them that it is not the intention of the Department to disturb them so long as they remain quiet and peaceable, and commit no depredations upon white settlers."

He further directed, "that a proper description of the said valley be obtained for the purposes of an executive order setting apart this valley for the exclusive use of said Indians, and that white settlers be advised that they are prohibited from entering or settling in said valley.

"He also authorizes an appraisalment to be made of the value of the improvements of said settlers in the Wallowa Valley, in order that Congress may be asked, at its next session, for an appropriation sufficient to pay for said improvements at their appraised value, in order that the claims of the settlers may be extinguished;" and also "transmitted to Agent Montieth" instructions "to give

such of the Wallowa Valley Indians, as may be in his vicinity, the assurances of the Department that they will be permitted to remain in *undisturbed* possession of the Wallowa Valley, and that the same will be set apart by Executive Order for their exclusive use;" and subsequently, upon the recommendation of the Secretary of the Interior, the following order was made:—

"EXECUTIVE MANSION,

June 16, 1873.

"It is hereby ordered, that the tract of country [commencing at the right bank of the mouth of the Grand Ronde river; thence up Snake river to a point due east of the south-east corner of Township No. one (1) south of the base line of the surveys in Oregon, in Range No. forty-six (46) east of the Willamette meridian; thence from said point due west to the west fork of the Wallowa river; thence down said west fork to its junction with the Wallowa river; thence down said river to its confluence with the Grand Ronde river; thence down the last named river to the place of beginning,] above described, be withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the roaming Nez-Perce Indians as recommended by the Secretary of the Interior and the Commissioner of Indian affairs.

"U. S. GRANT."

The area of this reservation is officially reported as 912,000 acres.

It is worthy of remark, that while the action taken, as above indicated, by the Department of the Interior and the Executive, is based on the report of the Commission, yet Superintendent Odencal nowhere recommends a separate reservation of that valley, but expressly states, that "owing to the coldness of the climate, the Wallowa Valley is not a suitable place for a separate reservation upon which to locate and keep Indians;" and writes, "They [Joseph's band] do *not* desire a separate reservation made of Wallowa Valley."

Young Joseph and his band, under the sanction of the foregoing Executive Order, possessed and occupied the Valley of the Wallowa during the seasons of '73 and '74.

Early in the summer of 1875 was issued an order of revocation, as follows, viz.:—

"EXECUTIVE MANSION,

June 10, 1875.

"It is hereby ordered, that the order dated June 16, 1873, withdrawing from sale and settlement and setting apart the Wallowa Valley in Oregon, described as follows: 'commencing at the right bank of the mouth of Grand Ronde river; thence up Snake river

to a point due east of the south-east corner of Township No. one (1) south of the base-line of the surveys in Oregon, in Range No. forty-six (46) east of the Willamette meridian; thence from said point due west to the west fork of the Wallowa river; thence down said west fork to its junction with the Wallowa river; thence down said river to its confluence with the Grand Ronde river; thence down the last named river to the place of beginning,' as an Indian reservation, is hereby revoked and annulled, and the said described tract of country is hereby restored to the public domain.

"U. S. GRANT."

I have no information of the preliminary steps which led to the issuing of this pregnant order. I trust I am not trespassing upon the confines of official propriety, in commenting in a purely official light upon the policy of the Interior Department in this particular. That the Secretary's recommendation, the basis of the Executive Order of June 16, 1873, was at least not judicious, I do not think any one, now, will seriously question. But that important decision, having been reached, without doubt after mature reflection, by authority empowered to enforce it, should have been rigidly adhered to. Nevertheless, I am convinced the order was an error. The Executive Order of June 10, 1875, revoking the former order, was "a political fault." If *not* a crime, it *was* a blunder. In intercourse with the Indian, it is not wise to speak with a forked tongue.

At the time of the treaty of '55 Wallowa Valley was a *terra incognita* to the whites. It appears to have been understood, by the Commissioners in behalf of the Government to that treaty, that the Elder Joseph claimed then for himself and his band this valley, if not as their peculiar, immediate home, at least as embraced within the locality and control of this band. It is probable that Joseph may have regarded it as among his outlying, adjacent possessions, and that he may have made there some partial improvements. There is evidence to this effect. Still the weight of testimony, that I have been able to gather, is opposed to this view of the question; and since, at my request, the Department Commander has removed the restriction contained in the opening paragraph of this report, I will proceed to state my opinion in the premises. The conclusions of fact, in the *second* and *third* articles of his report, at which Mr. Odeneal arrived, that the Old Chief Joseph owned Wallowa Valley, and assented to and signed the treaty of '55 on condition that this valley should be included within the boundaries of the reservation, are not sustained by the weight of evidence. The Officials who were

present at the council of '55 do not corroborate his statements, beyond the fact that Joseph, as it was understood by them, *claimed* at that date to own this valley; while he and his band were then known and designated, as Superintendent Palmer writes, as "the Salmon river band of Nez-Perces," a locality some distance away to the East and in Idaho. Mr. Monteith, who was a party, to the council of March '63, with Superintendent Odeneal, writes me, that they were "deceived by Joseph's Indians as to who was the chief of the Wallowa country. They told us that Old Joseph was; but from what I have learned since then from other Indians, this is not the case; but that an Indian by the name of 'Wep-tas-ta-man-na' was chief of said Wallowa country, and he was the only man who ever attempted to farm there. He found it so cold there that after one season he abandoned the place, and is now living on the reserve, &c." While the above named Indian, the Elder Joseph, and perhaps others, may have attempted to establish themselves in and thus set up an ownership to this valley, like the attempt of the South to force slavery upon Northern territory, the climate forbade it; for as heretofore stated, by Mr. Odeneal, himself, "owing to the coldness of the climate the Wallowa valley is not a suitable place * * upon which to locate and keep Indians." As a question of fact, the Wallowa valley was, undoubtedly, possessed in common by the Nez-Perce Indians, as a summer-resort, to fish, hunt, and graze their large herds of animals. Mr. Monteith writes: "For many years after the treaty of 1863, no one of the chiefs claimed it over another. The first dispute in regard to the valley took place about in 1871, at which time white settlers began to move into said valley, and Young Joseph laid claim to it." While there is some proof that Wallowa valley was Old Joseph's home, and I am willing to concede that it was an outlying possession of Old Joseph, if any one chief had there a rightful claim over another, still I maintain that the weight of proof is against his exclusive ownership, and I am convinced, sustained as my views are by the earlier known appellation of his band, that his peculiar and generally recognized home was on the Salmon river and the lower Im-na-ha near the Snake, the localities in which Young Joseph and the band, as is well-known, now have their home or abiding-place during the greater portion of the year.

Young Joseph, then,—who succeeded to the inheritance of his father, his possessions, rank, and the chieftainship of the Salmon river band,—has no rightful, exclusive ownership, in Wallowa valley, as against any Indian of the Nez-Perce Nation. It is their common heritage from "nature, and nature's God."

The following further citation, from the speech before referred to delivered in May '62 by Senator Nesmith, I venture to introduce here *in extenso*, since the views expressed therein—though probably somewhat colored—accord substantially with my own impressions of the past mismanagement of our Indian affairs, and the *modus operandi* heretofore in vogue in concluding treaties with the Indian tribes:—

"Mr. President: If there is any one department of our Government worse managed than another it is that which relates to our Indian affairs. Mismanagement, bad faith, fraud, peculation and downright robbery have been its great distinguishing features. Its defects have their origin in being organized upon a wrong basis. * * *

"Yet the policy of treating with and regarding the Indians as independent nations—which had its origin in our own weakness—has been continued, and we now daily witness the farce and burlesque on diplomacy, when the Government of the United States upon the one side, and a poor, degraded band of stolid, half-starved, and naked Diggers on the other, constitute the 'high contracting parties!'

"Treaties are written out conveying away millions of acres, not one word of which the Indians understand; and complicated articles involving the most abstruse legal provisions, furnishing subjects for interminable litigation, are fully explained and elucidated by some ignorant half-breed interpreter, who does not know one letter from another, but who acts under the direction of some politician, who desires to win his way to public favor by perpetrating a huge swindle upon those who have neither power or intelligence adequate to their own protection. While the Indians are lost in admiration in listening to the florid eloquence of some sharp commissioner, who dilates in the most extravagant hyperbole upon the justice and magnanimity of their 'great father at Washington,' they are quietly robbed of their patrimony. The few short months within which they are promised that their homes shall become a paradise by reason of the exuberance of the President's liberality, are succeeded by years of starvation, disappointment, and suffering. In the meantime, the treaty slumbers in the Department or the Senate; and when, after years of 'hope deferred,' the long-promised annuities arrive, deficient in quality and quantity, if not entirely absorbed or stolen by the dishonest agents of the Government intrusted with their management or delivery, the Indian, robbed of his hunting ground and his home, has contracted all of the vices of the white man, but none of his virtues,

and knows nothing of the Government, except the frauds and injustice which he has suffered at her hands, becomes a vagrant, and either from vice or necessity, commits depredations which involve his tribe in wars; and he only survives the conflict of arms to fall by the more insidious foe concealed in the miserable whisky of the unscrupulous trader.

"This, sir, is, with but a slight variation, the history of every tribe from Maine to Oregon who have been brought in contact with us. The fostering hand of our humane Government has despoiled and robbed them of their hunting grounds and their homes, while the Christianizing influence of our civilization has reduced them to squalid thieves, vagabonds, and prostitutes.

"The sanguinary and expensive wars which are engendered between the Indians and our frontiersmen are generally attributed to some fault or act of aggression on the part of the whites, while the real and original cause is the fault of the Government itself, by first adopting the policy of treating them as independent nations, and bringing them within the influence of our diplomacy for the sake of cheating them by the terms of a written treaty which they are unable to comprehend, and then, by delays and downright bad faith, neglect or refuse to discharge our part of the obligations. There have been but few Indian wars the cause of which cannot be traced back to some act of omission or commission on the part of the Government itself.

"In the case now under consideration, it was three years from the time that you sent your commissioners among the Nez-Perces to negotiate a treaty before it was confirmed. Every day and every hour of that three years' delay carried to the hearts of those simple people evidence of bad faith on the part of the Government. They were promised that the whites should not settle in their country until the first annuities were paid; but two years before they received a dollar the whole country was thrown open to settlement. Then, again, the annuities which were promised to be paid in stock and substantial improvements, were, in a great part, paid in utterly worthless articles; whistles and shoe strings, pod ankers and gimlets, and old, worthless, shelf-worn goods, purchased by some swindling agent in New York at three times their value, and then sent out at enormous expense of freights. The annuities bore no resemblance to what had been promised, either in value, quantity or quality. Then, again, the Government solemnly stipulated that no white man should reside upon the reservation. Your troops are withdrawn, and there are to-day from five to ten

thousand miners located there, and no power in this Government to remove them. * * *

"As before stated, our Indian policy had its origin in error, and in my opinion it would have been better if the Government had asserted its jurisdiction over them without the farce of recognizing their national character by treaty. It should have made ample provision for their comfort, which would in some degree have corresponded in value with the domain that we have acquired from them. In short, we should have done in reality what we have *professed* to do, and made them the wards of the Government, extending over them its fostering care and protection. It is, perhaps, too late to inaugurate a new policy, but it is not too late to begin to do justice; and the proposition now before the Senate presents a case where justice is imperatively demanded at our hands in behalf both of the whites and of the Indians. If the Government were to derive no immediate pecuniary benefits from the purchase, still it would be good policy to invest a few thousand dollars for the protection of both the Indians and the whites in that remote region, particularly when such an investment is likely to save the incurring of millions of expense in the prosecution of a war, to say nothing of the loss of life, and the destruction of property. But, looking at the matter in a mere financial view, I still contend that it is good policy to make the purchase."

In consulting authorities and searching the records—with ample time—with the purpose of preparing an accurate and full account of the Nez-Perce troubles, this report has taken on a form and grown to an extent not contemplated at the beginning: still I should regard it as unfinished and incomplete, did I not allude to the question—whether by the treaty of '63 the extinguishment of the Indian title, to land then occupied by the Nez-Perces adjacent to the present reservation, is legally perfected and complete; and much against my inclination offer a few observations thereon.

Near the middle of the last century, M. de Vattel, in his great work on the Law of Nations, recorded his convictions of aboriginal rights in the following language: I quote from the edition of 1852, reprinted in 1870, and here once for all acknowledge any citations I may make from this distinguished author: "There is another celebrated question, to which the discovery of the New World has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed (§81), in establishing the obligation to cultivate the earth, that those nations

cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had, from the beginning, resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature, in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English Puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession. This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania."

And in section 81, referred to (*supra*), treating of the natural obligation to cultivate the soil, he states: "Those nations (such as the ancient Germans, and some modern Tartars) who inhabit fertile countries, but disdain to cultivate their lands, and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts;" and of others, "who, to avoid labour, choose to live only by hunting, and their flocks," he remarks: "Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them."

Since the discovery of America, the Indian tribes never have been recognized as holding sovereignty over the territory they occupy; and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a

part of the matter ceded; but joined to their title of occupancy is the right of self-government, according to their own usages and customs, with the competency to act in a national capacity, though under the protection of and owing a qualified subjection to the United States.

"Public treaties can only be made by the superior powers, by sovereigns, who contract in the name of the state." Nevertheless, treaties of that nature may be entered into by communities, who have a right to contract them by the laws of the state, [tribe,] or by custom. "It is from the fundamental laws of each state, [from the laws and customs of each tribe,] that we must learn where resides the authority that is capable of contracting with validity in the name of the state." [tribe.] "Sovereigns treat with each other through the medium of agents or proxies who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries." The agents cannot deviate from their instructions; but every promise which they make in the terms of their commissions, and within the extent of their powers, is binding on their constituency. "A treaty is valid if there be no defect in the manner in which it has been concluded; and for this purpose nothing more can be required than a sufficient power in the contracting parties, and their mutual consent sufficiently declared." "Every public treaty, concluded by a king or by any other monarch, is a treaty of the state; it is obligatory on the whole state, on the entire nation which the king represents, and whose power and rights he exercises." If the treaties concluded between the United States and the numerous Indian tribes are to be viewed from the standpoint of enlightened civilization, and are to be treated and judged by the principles of law applicable to treaties between great Powers; each tribe regarded as a sovereign and independent nation, a high contracting power; the chiefs, headmen, or delegates, as the plenipotentiaries of that power, and vested with full authority to treat in the name of the nation they represent: then their engagements are binding on the whole nation: and the binding force of the treaty of '63 upon the Nez-Perces, as a tribe and individually, is conceded. But if otherwise; if the Indian tribes are not sovereign and independent; if they are domestic, dependent communities; if the Indian is the ward of the Government, at best but semi-civilized; if the Nez-Perce tribe is a confederacy of numerous bands, each more or less independent of the others; if the Indian cannot be disturbed in his enjoyment of the right of occupancy to his land, or deprived of it, without his full and free consent, unless by a just and necessary war; then the

principles of international law relative to treaties have no application in the premises; and the Nez-Perce treaty of '63 must be viewed from another and an inferior level; and judged and treated in accordance with the laws and customs of the Indian; and,—dependent upon the law Indian, (of which I have no knowledge,)—it may be seriously questioned whether its obligations are lawfully binding upon any but those chiefs and bands who were parties to it.

In my opinion, the non-treaty Nez-Perces cannot in law be regarded as bound by the treaty of 1863, and in so far as it attempts to deprive them of a right to occupancy of any land its provisions are null and void. The extinguishment of their title of occupancy contemplated by this treaty is imperfect and incomplete. This, however, is a question which demands and should receive the earnest and careful consideration of the Government, through the Department of Justice and the Judiciary.

It remains for the commissioner of Indian affairs to solve the problem of a politic and just disposition of the non-treaty Nez-Perces. Except that I suggest a departure from the temporizing policy, and a conciliatory and just, yet speedy solution of the problem, I have no matured sentiments to present.

I cannot refrain from adding a word to express my convictions of the real cause of the dissatisfaction existing among the Nez-Perces with the treaty of '63. Nature has implanted in the human heart a strong and undying love of home—the home, with its scenes and attachments, of childhood. This sentiment pervades the heart of the child of the forest and the plain,—the rude child of nature,—no less, perhaps with a more fervent glow, than the breast of the native of the city, the pampered child of enlightened and luxurious civilization. The birth-place of Lawyer, the homes of his followers, the parties to the treaty, were included within the limits of the established reservation; while its contracted area excluded the homes of Joseph and all the prominent non-treaty chiefs and their bands, and ceded their venerated Penates to the United States. To the parties to the treaty, it brought no loss, no change; to the non-treaties it revealed new homes, new scenes; it left behind deserted firesides; homes abandoned and desolate; casting a shadow upon their wounded and sorrowing hearts to darken and embitter their future existence. In this God-given sentiment—the love of home—is to be found the true cause of the Nez-Perce division.

In conclusion, I respectfully submit some material deductions of law and fact:

CONCLUSIONS OF FACT.

First—Originally the Nez-Perce Indians occupied a large extent of territory west of the Bitter Roots Mountains, in Idaho, Washington Territory, and Oregon, their title to which, running back before the memory of man, is undisputed and clear.

Second—The Nez-Perces never recognized any succession of chiefs as a dynasty to which a tribal allegiance was due, nor, prior to the year 1854,—with one imposed exception,—any chief as the head of the tribe; and from the elevation of Lawyer the headchief has been elective.

Third—The tribe was a confederacy; of numerous bands; each more or less independent of the others; and each having its own principal chief.

Fourth—In June '55 a treaty was concluded between the United States and the Nez-Perces, by the terms of which a large portion of their country was ceded to the United States, and the limits of their territory were more definitely defined. The Wallowa Valley was embraced within the land reserved.

Fifth—At the council in May '55, the chiefs and headmen appearing to regard Lawyer as the principal chief, the Commissioners recognized, commissioned, and treated with, him as chief of the Nez-Perce Nation.

Sixth—So far as many of the Nez-Perces were concerned the treaty of '55 was simply a result of superior intelligence and power in the guardian over the ward, and practically it was amicable coercion. Several of the chiefs protested against this sale of their lands; and even Joseph and Looking-glass signed the instrument under pressure and against their will.

Seventh—The treaty of '55 was not ratified by the Senate until March 1859; and then the Government with criminal neglect disregarded its sacred obligations.

Eighth—In June '63 a second treaty was negotiated by the United States, which greatly reduced the reservation established by the treaty of '55; the Nez-Perces yielding a further extended area of their lands, including Wallowa Valley.

Ninth—Neither of these treaties was concluded without strong opposition.

Tenth—Joseph, Eagle-from-the-Light, Big-Thunder and several less prominent chiefs, and headmen,—with their followers,—were not parties to the treaty of '63: have never acknowledged its binding force, or accepted any of its privileges or benefits. To the treaty they have objected the want of authority in the Indians

who spoke for the tribe. They have uniformly haughtily and utterly repudiated it.

Eleventh—From the date of this treaty, there has been a radical division of the tribe into recognized treaty and non-treaty Nez-Perces.

Twelfth—Whether the President of the United States has hitherto caused to be valued—and payment to be made therefor—the substantial improvement of any Indian (as in the treaties provided), or whether any Indian had then any substantial improvement to be valued and paid for, or otherwise, no Nez-Perce Indian or band of Indians,—except the chief Timothy, who claims for himself and his followers—, has ever, or does now, set up any claim to a residence off the established reservation by virtue of these provisions appearing in the treaties.

Thirteenth—A third treaty was concluded at Washington City, August 13, 1868. This is a treaty of concession.

Fourteenth—Provision is made, in the third article of the second treaty and the first article of the third treaty, for members of the tribe residing *outside* the reservation, from time to time, to come upon the present reservation and locate on a residue of land reserved and held in common, to whom "lots may be assigned from the lands thus held in common, wherever the same may be suitable for cultivation."

Fifteenth—But, having reference solely to the second and third treaties, so far as Young Joseph (and his band) in connection with his claim to Wallowa Valley is concerned, he has not claimed—even if he be entitled to them or any of them—the privileges and benefits of their several provisos. On the contrary he haughtily disavows these treaties.

Sixteenth—The surveys, provided for, were not extended to Wallowa Valley, nor were allotments made therein.

Seventeenth—Wallowa Valley was never permanently occupied by any Indian, or band of Indians, of the tribe; but it was possessed in common by the tribe as a summer resort, to fish, hunt, and graze their large herds of animals.

Eighteenth—Old Joseph never occupied Wallowa Valley as a home; but, on the contrary, his recognized peculiar home was on the Salmon, the In-na-ha, or the Snake near the mouth of the Grande Ronde.

Nineteenth—By Executive order dated June 16, 1873, an extensive tract, including Wallowa Valley, was "set apart as a reservation for the roaming Nez-Perce Indians." Two years later Executive order dated June 10, 1875, revoked and annulled the former order,

and restored this vast tract of country and Wallowa Valley to the public domain.

Twentieth—Young Joseph, with his band, never has occupied Wallowa Valley as a permanent home; but during the greater portion of the year makes his peculiar home on the lower Im-na-ha near the Snake.

CONCLUSIONS OF LAW.

First—Indians cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation throughout immense regions of the United States cannot be accounted a true and legal possession. We do not, therefore, deviate from the views of nature, in confining the Indians within narrower limits.

Second—The title of Indians to the land they occupy is a title of occupancy *only*. The sovereignty, the ultimate dominion is vested in the General Government.

Third—This occupancy belongs to them as a matter of right and not by mere indulgence. The Indian title is as sacred as the fee simple, absolute title of the whites.

Fourth—The laws of the United States provide that all intercourse with Indians shall be carried on exclusively by the General Government. Its jurisdiction over them is exclusive.

Fifth—The exclusive power to extinguish the Indian title to land is vested in the General Government, and either by purchase or by conquest.

Sixth—But this title can be extinguished only with their free and full consent, unless by a just and necessary war.

Seventh—All treaties, made under the authority of the United States, are the supreme law of the land.

Eighth—Treaties with Indian tribes are *now* prohibited by law.

Ninth—The treaties of 1855 and 1863 are treaties of cession, by purchase; the treaty of 1868 is a treaty of concession.

Tenth—The Nez-Perces, undoubtedly, were at liberty to renounce the treaty of 1855, (and probably the treaty of 1863), the Government having violated the treaty obligations.

Eleventh—But, the Nez-Perces choosing rather to adhere to it, the *laches* of the Government were probably condoned, by the Indians subsequently accepting the benefits and privileges, when tendered, of that treaty.

Twelfth—The sixth article of the treaty of '55,—and this provision in effect is repeated in the third article of the treaty of '63 and the first article of the treaty of '68—provides for a survey, of

the whole or portions of the reservation, into lots which may be assigned to individuals or families of the tribe.

Thirteenth—It is from the fundamental laws (the laws and customs, Indian) of each state (tribe) that we must learn where resides the authority that is capable of contracting with validity in the name of the state (tribe.)

Fourteenth—In the formation of every treaty, the contracting parties must be vested with sufficient powers for the purpose.

Fifteenth—The non-treaty Nez-Perces cannot in law be regarded as bound by the treaty of 1863; and in so far as it attempts to deprive them of a right to occupancy of any land its provisions are null and void. The extinguishment of their title of occupancy contemplated by this treaty is imperfect and incomplete.

Sixteenth—In the absence of treaty provisions or statute law to the contrary, Indians hold their land in common. Wallowa Valley was held in common by the Nez-Perces.

Seventeenth—Young Joseph has no rightful, exclusive ownership in Wallowa Valley as against any Indian of the Nez-Perce Nation.

Lawyer retained the chieftainship of the Nez-Perce Nation until the election in the autumn of '72, when he was defeated by Jacob. Lawyer was re-elected in '74, but was succeeded in April 1875 by Renben—Tip-n-la-lai-ony-kul-la-tsa-kin, (The Eagle that speaks all languages.)—the son-in-law of the old chief Joseph, who died in 1871 proud, brave and uncompromising. Wallowa, the beautiful valley which he loved so well, holds all that was mortal of the Nez-Perce patrician. Lawyer died January 7th, 1876, at the age of about eighty, full of years and of honors; the steadfast friend of the pale-face; the most distinguished Indian of his tribe.

Time, or better, Providence, seems to right all things. Decades, centuries, cycles, even eons of years may pass. Napoleon divorced Josephine. And to-day, while many of the descendants of the lovely Empress occupy thrones or exalted stations closely allied thereto, the blood of the Great Corsican courses not through the veins of any monarch. So with Lawyer, the ambitious republican, and Joseph, the hereditary but unsuccessful chieftain. They have gone to the happy hunting-ground. Yet Joseph lives and reigns in the person of his daughter, the wife of Tip-n-la-lai-, the principal chief of the Nez-Perce Nation.

Some one has said, history repeats itself. In the Black Hills, with the Sioux Indians, the same policy of violated pledges is to-day having its inception. The wrongs suffered, the sacred treaty obligations disregarded, the insults, outrages, and political

crimes, heaped upon the Nez-Perces nation, are re-enacting towards the Sioux. If our Government cannot keep its plighted faith, even with the Indian, if it has no sense of honor left, the civilized nations of the globe will not be slow to find it out, and when they do, there is reason to fear a chapter in our history remains to be written which mankind shall tremble to read.

In the historical or narrative portion of this report I have recorded what I conceive to be the facts; I am convinced that substantially and in all essential particulars the recital is correct. I have aimed to write nothing but the truth, and if hereafter mistakes be found, they have come through want of authentic information and not with any design to perpetuate error.

Respectfully submitted,

H. CLAY WOOD,

Assistant Adjutant General.

NOTE.—The subjoined communication reached me too late, even had I deemed it necessary, to make any change in the text of the foregoing report. Still, both because it may tend to secure greater historical accuracy, and because the views of the writer are not in exact accord with my own as hereinbefore expressed, I cheerfully append his letter. However, the question, viz:—the peculiar locality formerly occupied by Old Joseph and his band—raised by Mr. Monteith, is not material to my argument. In antagonizing the claim of Young Joseph to the exclusive ownership of Wallowa Valley, I have endeavored to show (page 35), based upon what most assuredly appears to have been the well-known appellation of Joseph's band and upon the present local habitation of the band, 'that his peculiar and generally recognized home was on the Salmon river and the lower Im-na-ha near the Snake.'* But I am perfectly willing to concede that his home was on the Snake near the mouth of the Grande Ronde; either locality suits my purpose, and I adopt this locality the more readily, as I desire specially accuracy of statement.

I do not agree fully, however, with Mr. Monteith, as to the former designation of the band. General Palmer in his annual report in 1855, writes: "The Yakamas, with whom Gov. Stevens effected a separate treaty, Cayuses, Walla-Wallas, and Salmon river band of Nez-Perces (*being Joseph's band*), at first exhibited much opposi-

* [Dr. William C. McKay, who was present at the Council in '55, writes, "Old Joseph and his band were known as the Imnaha or Wallowa (?) bands of Nez-Perces."]

tion to negotiate, refusing even to smoke our tobacco or partake of our provisions, &c." A few days since General Palmer personally re-affirmed this citation as his present views of the then-understood designation of Joseph's band. Mr. R. R. Thompson, who was present at the Council of '55, confirms this fact, corroborating General Palmer. I have, however, a theory upon this point, as follows. In my researches, I have observed that the earliest explorers and writers speak of the Nez-Perce nation as composed of two parts or bands, viz.: the Upper and Lower Nez-Perces, from their location, relatively (I assume) to the Snake; the upper portion living upon the Salmon river and its tributaries; the lower portion nearer the Columbia upon the Clearwater and its branches; the two uniting and commingling on both banks along the Snake between the mouths of these two watercourses. These two factions were accustomed to speak of each other as "consins." Old Joseph and his band belonged to the upper Nez-Perces. He was their most prominent chief, and among the upper Nez-Perces were found those who asserted his claims to the chieftainship of the tribe. The upper band was probably in early times designated as the Salmon river band, because most of the upper Nez-Perces had their homes upon or adjacent to this river. Old Joseph thus came to be known as the principal chief of the upper, or Salmon river band; and from being a designation originally applying to the whole band of upper Nez-Perces, it was subsequently transferred to Joseph and his immediate followers; and though he may never in fact have lived upon the Salmon river, but had his peculiar home upon the Snake near the mouth of the Grande Ronde, still by the time of the treaty of '55, Old Joseph and his band was the only then recognized "Salmon river band of Nez-Perces." Nevertheless, I am not wedded to this theory; and, indeed, I am now rather inclined to the belief that the permanent home of the Elder Joseph and his band was about the mouth of the Grande Ronde on the Snake; especially, as above stated, as the choice of any locality as his peculiar home, *provided* it be not Wallowa Valley, is not material to my argument.

OFFICE INDIAN AGENT, NEZ-PERCE INDIANS,

Lapwai, Idaho Territory, April 24, 1876.

SIR:—In reply to yours of the 11th instant,—I mailed my answer to your former letter April 9th, 1876, and presume it has reached you ere this,—my answers to your questions of the 11th instant are as follows:—

1. Old Joseph's father was "Oll-la-cent," a Cayuse chief. He had

two wives, one the mother of Old Joseph or "Wal-lam-mute-kiut," (his Indian name,) and she was a Nez-Perce woman from near the mouth of the Ashotin on the Snake River. The other wife was a Cayuse woman and the mother of "Five-crows," chief of the Cayuses.

2. Old Joseph was born near the mouth of the Grande Ronde.

3. Old Joseph took his wife from a band living on the Snake River near the mouth of the Ashotin. She was the mother of several children, including Young Joseph. The Indians say she was only part Nez-Perce. I am unable to ascertain of what other blood she was. It could not have been Snake as the Nez-Perces and Snakes were always enemies. * *It is a mistake that Joseph's band was formerly known as the "Salmon river band."* They never lived on the Salmon river. In early years Old Joseph lived on the Snake River with his people above and below the mouth of the Grande Ronde, and continued to live there until Mr. Spalding came among the Nez-Perces in 1836, when he left his people and moved on the Lapwai creek, taking and fencing a small field and cultivating the same in part, and attended Mr. Spalding's school. He remained here until after the massacre of Dr. Whitman and others. After said massacre, Mr. Spalding left this section of the country and went to Oregon. After Mr. Spalding left, the Indians under the lead of "Big-Thunder"—who claimed the Lapwai country—gave notice to the effect, that all those who had moved on to the Lapwai during Mr. Spalding's stay here, must return to their respective localities as they were not wanted on the Lapwai. In accordance with this notice, Old Joseph and his family went back to the mouth of the Grande Ronde where he continued to live until he died in 1873. (?) †

In regard to the mixture of Indians living on the Snake river from the mouth of the Ashotin down, it is hard to tell what they are. There are Nez-Perces, Cayuses, Walla-Wallas, Umatillas, Yakamas, and La-li-ine or Columbia river Indians; also some Spokans.

The chiefs of the various bands on the Salmon river were as follows:

Those at the mouth of Salmon river, acknowledged as their chief, Capt. John or "Ip-she-nee-wis-kin, deceased. Of those living about 20 miles above, "Hah-hahs-tues-ta" is their chief. White

* [May she not have been a captured Snake?]

† [It is stated, page 43, upon authority, that Old Joseph died in 1871; and Colonel Whipple writes his grave is in Wallowa Valley. Did not the elder Joseph die where he is buried?]

Bird or "Pen-pen-hi-hi" is the chief of those living at the mouth of White-bird creek. "Tip-n-la-lai-cow-a-poo" (Eagle-from-the-light) is chief of those living at the mouth of Slate creek. These are the names of the chiefs who claim the whole of the Salmon river country.

A chief by the name of "Quil-quilsh-nu-ut" claims the east half of "Camas prairie."

Very respectfully,

JNO. B. MONTIETH,

U. S. Indian Agent.

H. Clay Wood, A. A. Gen'l,

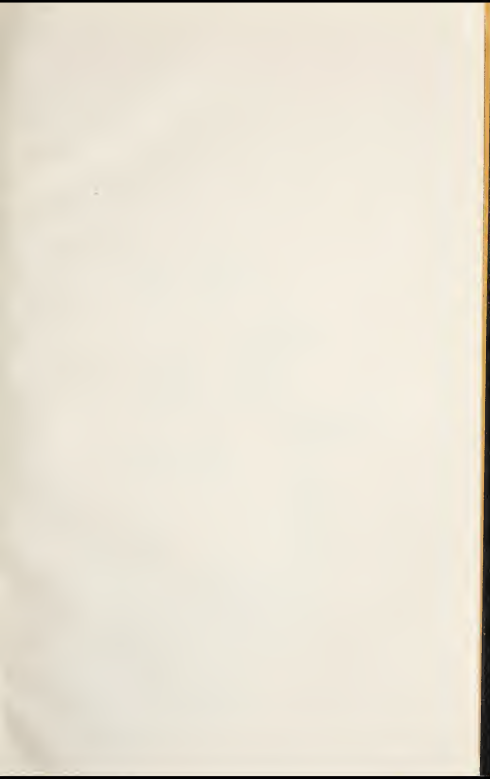
Portland, Oregon.



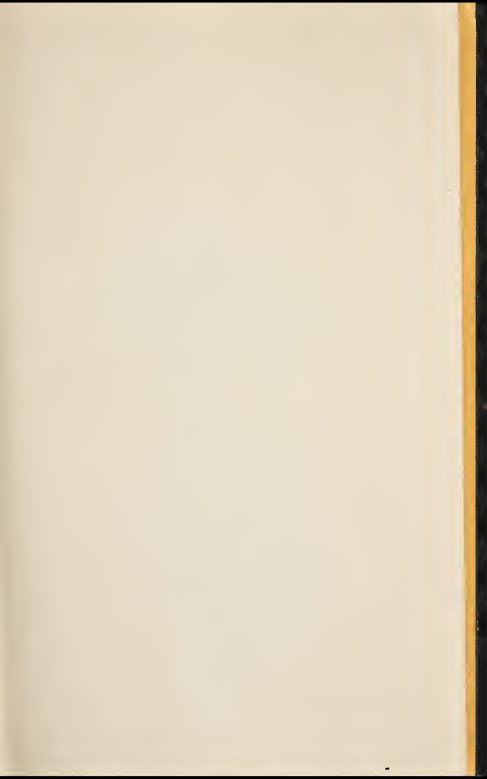












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